IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.144 OF 1991

Vasant Mahadeo Kadam
Occupation Agriculture,
Resident of Gadkar Ali under
Karanje, Taluka and
District Satara ... **Appellant**
(Original Defendant)

Versus

(1)Ramchandra Bhiku Kadav
Since deceased by his heirs :-
(a) Shri Ravindra Ramchandra Kadav
(b) Shri Rajendra Ramchandra Kadav
(c) Shri Sunil Ramchandra Kadav
(d) Shri Vishwas Ramchandra Kadav
(e) Shri Dilip Ramchandra Kadav
(f) Smt. Sundarabai Ramchandra Kadav
(All residents of Gadkar Ali,
Dist.Satara Amended
vide Court's order Dated
19th June,1997 in C.A.1880/96... **Respondent**
(Original Plaintiff)

Mr. V.A. Thorat Advocate for Appellant
Mr. S.G. Karandikar Advocate for Respondent

*CORAM : **S.R.SATHE,J.***
*DATED : **30th JUNE, 2006***

ORAL JUDGEMENT :-

1. The Appellant/original defendant in regular Civil Suit No. 205 of 1983 has preferred this appeal against the judgement and order passed by the Court of District Judge, Satara whereby the order passed by the Trial Court decreeing the Plaintiff's suit for permanent injunction was confirmed and the appeal was dismissed. For the sake of convenience hereafter the parties shall be referred to as

'Plaintiff' and 'defendant'.

2. The Plaintiff's case in brief is that the suit land bearing Survey No.366/5 admeasuring 17 gunthas situated at Village Karanje is jointly owned by him alongwith his two brothers Jagannath Bhiku Kadav and Shankar Bhiku Kadav. There is a old house and cattle shed belonging to them at the south-east corner of their property. According to Plaintiff to the West side of their property, there is a land bearing No. 366/4 admeasuring 2 gunthas owned by one Housabai Kadam and to the north of the said house, there is a land bearing Survey No. 366/3A admeasuring 7 gunthas owned by the defendant.

3. According to plaintiff, though defendant was not at all concern with the Plaintiff's suit land, on 22/01/1983, the defendant with the help of his son put some branches of tree at the distance of about 10 to 12 ft. from the house of Jagannath. When Jagannath's wife obstructed for the same, defendant promised to remove the same, however, actually did not remove the same. On the contrary, thereafter the defendant started saying that he would arrange the fodder heap at the said place. Hence Plaintiff filed the present suit for permanent injunction restraining the defendant and his agent from entering in the suit land and using it for any purpose.

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4. The defendant filed his Written Statement at Exh-21 and contended that the description of the suit property given by the Plaintiff in the plaint is not correct and it is not as per the record. According to him, the boundaries given by the Plaintiff were not correct. The defendant also denied the Plaintiff's allegation that he with the help of his son put some branches of trees to the west of the house of Plaintiff's brother. According to defendant, 21 gunthas land out of city survey No. 366 was purchased by one Maruti Kondiram Kadam under the Sale Deed dated 09/08/1907 and thereafter Maruti Kadam gave the said property to defendant's father by register gift deed in the year 1922 and since then defendant is in possession of the said land. He also contended that some portion of the said land was leased out to Rajaram Jadhav and thus, Plaintiff's suit is false. The portion where defendant's placed the branches form part and parcel of his property. The defendant therefore prayed for dismissal of the suit.

5. On these pleadings, the learned trial Judge framed issues at Exh-31. In order to prove the suit claim the Plaintiff examined himself at Exh-76 and cadestral surveyor who drew the map of the suit land at Exh-78. As against this, the defendant examined himself at Exh-81. Both the parties produced certain documents.

6. After considering the evidence of both the parties, learned trial Judge came to the conclusion that Plaintiff has proved his possession for the suit property and defendant has no right to obstruct him. Naturally, he decreed the suit in plaintiff's favour.

7. Being aggrieved by the said order the defendant filed Regular Civil Appeal No. 493/1986 in the District Court, Satara. After hearing arguments of both the learned advocates, learned first Appellate Judge also came to the conclusion that the Plaintiff has proved his possession over the suit land on the date of suit. Naturally, he dismissed the appeal.

8. The above mentioned order is challenged by the defendant in this Second Appeal. From the perusal of the record, it is clear that while admitting this appeal this Court ***(CORAM : A.A. DESAI, J.)*** passed the following order :-

> *" Admit. Whether the Plaintiff is entitled to injunction simplicitor without being claim for recovery of possession would be the substantial question of law involved in this appeal."*

9. In this appeal before me the learned advocate for

the appellant has urged only two points. Firstly, he submitted that both the courts below have not properly appreciated the evidence on record and wrongly held that the suit property is in possession of the Plaintiff. Secondly, he canvassed before me that from the evidence on record it appears that the defendant is in fact having his shed on the suit land and defendant is accordingly in possession of the suit land. So, the Plaintiff's suit simplicitor for permanent injunction without there being claim for possession is not maintainable. He, therefore, submitted that the appeal be allowed and suit be dismissed.

10. The learned advocate for the appellant submitted that Appellate Court has given undue importance to the revenue entries. However, the said entries by themselves do not create any title. In order to support this submission, he has placed reliance on case ***JATTU RAM V/S. HAKAM SINGH AND OTHERS (1993) 4 SUPREME COURT CASES 403***. Firstly, it must be noted that the facts of this reported case and facts of the case in hand are quite different. In the instant case, both the Courts below have mainly considered the point that the Plaintiff is the owner of the suit land bearing Survey No.366/5, which is in fact not disputed by the defendant. So, there was no question of Courts below holding on the basis of revenue record that Plaintiff is the owner of the land bearing Survey No.366/5. So, above cited ruling is of no use to the appellant.

11. As against this, Shri Karandikar, learned advocate for the Plaintiff supported the judgement and order passed by the Courts below. He also submitted that there is in fact no sufficient evidence to show that the defendant is having his shed in the land bearing No. 366/5 and defendant is in possession of the same. So, there is no question of seeking any possession from the defendant.

12. It is not in dispute that the Plaintiff is the owner of the land bearing Survey No.366/5 admeasuring 17 gunthas. Though, the defendant has contended that the description of the suit property given by the Plaintiff is not correct. He has not pointed out as to how and why the same is not correct. On the contrary, if we peruse the map drawn by the cadestral surveyor which is at Exh-79 and his evidence at Exh-78, it is very clear that the description of the suit property given by the Plaintiff is correct.

13. It is the case of defendant that he is the owner of the land admeasuring 21 gunthas out of survey No.366 and the said land is received by way of gift to his father from Maruti Kadam. He has produced said gift deed at Exh-84. In the said document, the southern boundary is shown as the road. On the basis of this southern boundary, it is contended that sub-devision-4 is belonging to and in

possession of Hausabai Kadam and is not the part of sub-division-3. If we peruse the Sale Deed whereby Maruti Kadam purchased the property we found that there is reference of only survey number and pot-hissa or sub-division is not mentioned therein. So, it must be held that defendant has in fact not proved that he is any way concerned with the land bearing Survey No.366/5. In fact, it is not even his contention in his written statement. So one thing is certain that Plaintiff is the owner of the land bearing Survey No. 366/5.

14. It is argued on the behalf of the defendant that there is one shed in the suit land and the same is in possession of the defendant, so it is necessary for the Plaintiff to file suit for possession. However, it is not the case of the Plaintiff that defendant has made an encroachment on the land bearing Survey No. 366/5 and constructed the shed. It must be noted that there is no sufficient pleadings and evidence on record to show that there is any shed owned and possessed by the defendant in the land bearing Survey No.366/5. It is true that cadestral surveyor in cross-examination has referred one shed and has stated that it is of defendant, however, besides his bear word there is absolutely no other evidence on record to indicate that the shed in question is owned and possessed by the defendant and it forms part and parcel of his

property. In fact, the defendant has not adduced any sufficient evidence in that behalf but has only stated that his house is situated on 366/1 and 366/3A is barrel land and there is one old hut which belongs to him. According to him, the said hut is being used by one Babu Shripati Kadav, with his permission. However, it is pertinent to note that he has not examined the said Babu. He would have been the best person to state as to whether the hut in question is in his possession However, the best possible evidence is not adduced by the defendant and as such adverse inference has to be drawn against him. It appears from the record that this point with regard to hut was not agitated before the first Appellate Court. So, there is in fact no substantial question of law involved in this second appeal. Both the Courts below have recorded concurrent findings of fact that Plaintiff has proved his possession over the suit land on the date of the suit and as such there is no reason to interfere with the said findings. The injunction issued by the first Appellate Court is in operation since the year 1990.

15. In this view of the matter, the appeal is dismissed with cost.

(S.R.SATHE,J)

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